

No. 15916  
IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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HERMAN AXELBANK,

*Appellant,*

*vs.*

GEORGE RONY, THE COPLEY PRESS, INC., HALLMARK  
PRODUCTIONS, INC., KROGER BABB, FOX WEST COAST  
THEATRES CORPORATION, NATIONAL BROADCASTING  
COMPANY, INC., and DOES ONE through TWENTY,

*Appellees.*

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**APPELLEES' BRIEF.**

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**APPELLEES' BRIEF.**

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**STATEMENT OF POSITION.**

Appellant is here challenging the trial court's findings of fact. In order to prevail on such a challenge, appellant must establish that those findings are "clearly erroneous."

See, *e. g.*,

*Overman v. Loesser*, 205 F. 2d 521, 522 (C. A. 9, 1953).

It is submitted that appellant has failed to meet this burden. Indeed, as we shall demonstrate, the trial court's findings are amply supported by the evidence adduced at the trial. Moreover, when the controlling legal principles are applied here to the facts thus found, it will be seen that the trial court's judgment was proper in all respects.

## STATEMENT OF THE CASE.

Appellant's opening brief does not present an accurate and complete statement of the facts pertinent to this appeal, as required by Rule 18 (2) (c). Accordingly, in order to apprise the Court of the facts as established at the trial and as found by the trial court, we have prepared a statement of the case in accordance with the proof adduced at the trial.<sup>1</sup>

### Nature of the Action.

The present case involves an action by Axelbank against Rony and others for alleged infringement of a copyright in the film "Tsar to Lenin." [C. T. A. p. 16]. Rony filed a counterclaim for libel against Axelbank based upon a letter Axelbank had sent to Jack Heintz, an official of Television Station KCOP (hereinafter designated the "Heintz letter").<sup>2</sup> [C. T. A. p. 41].

### The Film "Tsar to Lenin."

#### A. Nature of the Film.

The film "Tsar to Lenin," which Axelbank claims to have been infringed by defendants here, is merely an ar-

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<sup>1</sup>In the present brief, defendant and respondent George Rony will be referred to as "Rony" and plaintiff and appellant Herman Axelbank as "Axelbank."

Reference to the Reporter's Transcript on appeal will be designated by the initial "T" followed by appropriate page and line reference; reference to the Clerk's Transcript on Appeal will be designated by the initials "C. T. A." followed by appropriate page reference.

<sup>2</sup>While Axelbank makes vague references in his brief to a claim of unfair competition, no such claim was established at the trial. (See Point II, *infra*.)

rangement of a collection of newsreel and documentary films portraying a segment of Russian history surrounding the Russian Revolution of 1917, supplemented by a few charts and maps.

Axelbank testified that the motion picture "Tsar to Lenin" was compiled from "original negatives" purportedly bought from agents of the cameramen who photographed the events in question. This claim is without creditable substantiation in the record. Axelbank's witness, Max Eastman, never saw any original negatives [T. p. 52, line 14] and Eastman himself purchased in Europe on the open market prints of certain of the films used in Axelbank's motion picture [T. p. 67, line 6; p. 69, line 8], including the scenes of the Czar's swimming, etc. [T. p. 69, line 8; p. 70, line 16].

**B. Prior Publications of Material Contained in  
"Tsar to Lenin."**

Prior to defendant's exhibition of their films, Axelbank had made numerous publications of the film "Tsar to Lenin," without notice of copyright. Thus, Axelbank sold outright prints of films which later were incorporated in "Tsar to Lenin." Axelbank licensed portions of "Tsar to Lenin" for exhibition without notice of copyright. Axelbank licensed the use and reuse of portions of his film for television network exhibition and had also made prior motion pictures using the same scenes and sequences as are contained in the picture "Tsar to Lenin." These motion pictures were also exhibited and published without notice of copyright. [T. p. 201, line 8; p. 380, line 10; p. 411, line 7; p. 469, line 3].

### C. Appellant's Lack of Ownership.

Axelbank's claim of copyright proprietorship rests on a purported assignment from Axelbank as receiver to himself in his individual capacity in 1952. In point of fact, the assignment was ineffective when made, and as we shall point out hereafter, Axelbank's attempt to sustain that assignment by virtue of a purported *nunc pro tunc* order of a New York court, made and entered after Axelbank filed this action, is untenable. The facts with respect to the aforesaid assignment and the aforesaid *nunc pro tunc order* are set forth below (see Point ID) and we will not repeat that discussion here.

### Defendants' Films.

#### A. Nature of the Allegedly Infringing Films.

The defendants' films, like Axelbank's, are compilations of newsreel shots and documentary photographs of Russian historical events. Like Axelbank's films, they are not staged nor performed by professional actors but are actually photographs of the events which they portray.<sup>3</sup>

Defendants' films were collected over the years by defendant Rony and assembled for exhibition in Rony's television series entitled "Background to Battle" exhibited on Television Station KCOP Los Angeles, and portions of such films were made available to defendants National Broadcasting Company and Hallmark Productions.

#### B. Independent Preparation of Defendants' Films.

The evidence established that defendant Rony had never seen the film "Tsar to Lenin" prior to the filing of this

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<sup>3</sup>No evidence whatever with respect to defendant Fox West Coast Theatres Corporation was presented at the trial by any party.

action [T. p. 800, line 19].<sup>4</sup> This fact in itself would appear sufficient to defeat Axelbank's claim of copying.

However, the trial court's findings in this regard were not premised solely on such lack of access but were supported by a mass of evidence, both oral and documentary, which established beyond question that defendants' films were the product of long years of independent research on the part of Rony. In light of the importance of this testimony to the issues involved on this appeal, it is surprising to find that Axelbank completely ignores it in his "Statement of Case." We, therefore, believe it in order to recite briefly the facts as adduced at the trial with respect to the background and preparation of defendants' films.

Defendant George Rony was born in St. Petersburg in 1905, and was present in Russia during the 1917 Russian Revolution [T. p. 653, line 1; p. 655, line 10]. He developed an early interest in motion pictures and actually photographed events occurring during the Russian Revolution [T. p. 655, line 9 *et seq*] and became an apprentice and later an employee of the Russian film industry under the aegis of the Soviet Government [T. p. 657, line 15], helping to assemble the film library of the then new Soviet Government in both Leningrad and Moscow [T. p. 657, line 19].<sup>5</sup>

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<sup>4</sup>Rony had never met the plaintiff until the fall of 1955 [T. p. 797, line 8] although he had learned of plaintiff's existence upon being called to testify as an expert witness in an action which plaintiff had brought in the New York Federal District Court [T. p. 798, line 10]. Rony first learned of plaintiff's film "Tsar to Lenin" in 1952 when such expert testimony was given [T. p. 799, line 11]. Rony first saw the film "Tsar to Lenin" in 1956 [T. p. 799, line 18] after this action was filed.

<sup>5</sup>The Soviet Government confiscated all privately held motion pictures, including documentary films [T. p. 658, line 7].



Rony realized at an early date that documentary films of the Russian Revolution would be important for educational and historical purposes [T. p. 658, line 13]. During the course of Rony's employment in the Soviet film industry, he made plans to escape from the Soviet Union and to take prints of documentary films with him [T. p. 658, line 23, *et seq.*]<sup>6</sup> (Rony was actually present when documentary films in the private collection of the Czar were located in the Leningrad Winter Palace [T. p. 661, line 5]. He obtained a print of such films at the time they were discovered by Soviet soldiers in the Winter Palace [T. p. 661, line 21].<sup>7</sup>

The Soviet film industry compiled catalogs and listings of documentary films produced in the Soviet Union [Deft. Exs. "L" and "M"] [T. p. 710, line 24],<sup>8</sup> and prints of such documentary films were *sold outright* in the Soviet Union [T. p. 712, line 7] and were exhibited in the Soviet Union [T. p. 724, line 21]. Such films comprise a substantial portion of defendants' films about which Axelbank complains [T. p. 752, line 15; p. 753, line 15; p. 754, line 18; p. 757, line 1, *et seq.*] [See also Exs. "L", "M", "N" and "O"].<sup>9</sup>

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<sup>6</sup>While working in the Soviet film industry, Rony also wrote articles on motion pictures [T. p. 766, line 6] and books on motion picture themes [T. p. 766, line 23].

<sup>7</sup>These films included scenes depicting the private life of the Czar and his family and documentation of religious ceremonies in which the Czar took part [T. p. 662, line 6]. (Certain of these scenes appear in Axelbank's motion picture "Tsar to Lenin").

<sup>8</sup>Such catalogs were introduced into evidence upon the trial of this action and contained descriptions of scenes and prices for which said films were sold in the Soviet Union [T. p. 711, line 8, *et seq.*].

<sup>9</sup>Such films also comprise a substantial portion of the film "Tsar to Lenin" [T. p. 712, line 25, to p. 713, line 8; p. 719, lines 2-21].

Rony left Russia in 1929 [T. p. 728, line 24], after making arrangements to have films and documents forwarded to him in Poland [T. p. 730, line 16]. Upon leaving Russia and picking up his films and documents in Danzig, Rony went to Berlin and worked in the motion picture industry in Germany [T. p. 771, lines 8-24]. While in Berlin, Rony collected other Russian historical film and newsreel footage [T. p. 775, line 5, *et seq.*]<sup>10</sup> Rony formed his own film company in Germany and continued to collect films and produce motion pictures until Hitler came to power, at which time Rony fled from Germany [T. p. 785, line 21, to p. 786, line 4].<sup>11</sup>

Rony then went from Germany to France where he produced technical and documentary films [T. p. 787, line 14].<sup>12</sup> While in France, Rony bought and sold newsreel and documentary films [T. p. 792, line 20 *et seq.*]. Rony finally fled France after the Germans invaded in 1940, and came to the United States, leaving behind him a vast film library of documentary films [T. 793, line 18]. Rony caused this library to be hidden and he returned to France after World War II in 1947, where he was able to locate some of his film library [T. p. 794, line 9] which he then shipped to the United States [T. p. 794, line 13].

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<sup>10</sup>Some of the film viewed and purchased by Rony in Berlin was also contained in Axelbank's film "Tsar to Lenin" [T. p. 779, lines 3-22].

<sup>11</sup>Rony had produced an anti-Nazi film entitled "The Wooden Cross" which film was banned by Hitler [T. p. 786, lines 11-24].

<sup>12</sup>In France, Rony produced a picture entitled "Tower of Babel" [T. p. 789, line 8], a documentary film depicting world history, containing film which also appears in Axelbank's motion picture "Tsar to Lenin" [T. p. 789, line 14].

While in France, Rony also compiled a movie entitled "From Lenin to Hitler" [T. p. 791, line 16]—another historical film.



After coming to the United States, Rony commenced lecturing and earned his living by making historical lectures and exhibiting certain of the films which he had brought from France [T. p. 794, line 23, *et. seq*], including the films which Axelbank is here claiming infringe "Tsar to Lenin."

### The Heintz Letter.

Rony produced a television series entitled "Background to Battle" which was exhibited on defendant Copley Press Television Station KCOP [T. p. 803, line 15]. Rony was narrator of the series and used his films in assembling the program [T. p. 804, line 5]. While the series was in progress, Rony learned that Axelbank had written a letter to KCOP suggesting that Rony had pirated Axelbank's film "Tsar to Lenin" and setting forth a violent distribe against Rony. Since this letter forms the gravamen of Rony's libel charge against Axelbank, we have set it forth *in haec verba* below.<sup>13</sup>

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<sup>13</sup>"September 5, 1955

"Mr. Jack Heintz  
K C O P - T V  
1000 N. Cahuenga Boulevard  
Hollywood, California  
"Dear Mr. Heintz:

"Ironically enough, the name of last Friday evening's chapter of your series 'Background to Battle' is 'The Big Fraud.' My attorney and I sat in amazement watching your television show every shot of which was pirated from a 'hot' 16mm print of my copyrighted feature-length film 'Tsar to Lenin' which was stolen from a New York laboratory while in possession of my commentator Max Eastman, a senior editor of Reader's Digest.

"My film, which will be coast-premiered at the Marcal Theatre here very shortly, took longer to make than any other in film history. I spent most of my adult life in producing it. The actual research, foreign travel and production took over thirteen years and represents the best work of over a hundred cameramen, including Jack Reed, Harvard graduate and author of 'Ten Days That Shook The World.'

"To mention but one expense item in a big ledger full of cost figures: the trip to Europe in the summer of 1929 to film Kerensky

After learning of the Heintz letter, Rony, at the suggestion of KCOP's counsel, arranged a meeting with Axelbank [T. p. 806, line 15, *et seq*]. At such conference, Axelbank threatened Rony with this lawsuit and also threatened to harm Rony's children [T. p. 807, line 8, to p. 809, line 22].

Upon receiving Axelbank's letter to KCOP, containing its defamation of Rony and its threat of a lawsuit, Rony's program on KCOP was terminated [T. p. 739, line 8], *specifically as a result of Axelbank's letter* and the threat of this lawsuit [T. p. 739, line 12]. At the time of the trial, the program was still removed from television and has never been restored to this date.

in Paris and Trotsky on the Island of Prinkipo on the Sea of Marmora, cost over \$5,000.—and that was a mild venture compared to the deadly work of getting original 35mm negatives out from behind the 'Cordon Sanitaire' (in the years 1918-1921) when it was even more dangerous than the 'Iron Curtain'.

"We have finally found this George Rony, who in one instance during your show last Friday evening exclaims in his running commentary that he photographed that particular film (of Russian troops in Petrograd in 1917!) while admittedly he was only twelve years old! It will be interesting to learn from this witness what camera he used. The old Pathe box camera with which this shot was taken by cameraman John Dored would have out-weighted the twelve-year old Rony three to one!

"He shrewdly cut this 'hot' print up into an unrecognizable jumble of unrelated shots in a hodge-podge of picture-puzzle claptrap to evade comparison with the original from which it was pirated. The twice-duped material from this stolen 16mm print is therefore so poor in photographic quality that it scarcely resembles my original print from my original negative—which you will readily see at the Marcal Theatre soon.

"My attorney and friends who sat watching this nefarious disservice to your very fine and intelligent Los Angeles community agreed that the piracy is 100% all inclusive. Although he cut it up into an intangible mess of incoherent 'duped' hogwash, there is not one single shot of it that wasn't lifted from this 'hot' 16mm print of my copyrighted film!

"He has the gall to proclaim to a video audience of almost two million decent unsuspecting Californians in a main title: 'WRITTEN, DIRECTED AND PRODUCED by GEORGE RONY'—no less!

"This is to advise you that his claim to having risked his life and 'smuggled' the film in a coffin out of Russia is entirely false.

## Trial Court's Findings and Judgment.

The trial court found that Axelbank's material was not properly subject to copyright as it was drawn from the public domain, as were defendants' films. The Court found further that defendants did not copy or take or profit from the use of any property owned exclusively by Axelbank. The trial court also found that at the time this action was filed, Axelbank was not the proprietor of a valid copyright in the motion picture "Tsar to Lenin," and that Axelbank had exhibited such motion picture with an improper notice of copyright.

The trial court further found that defendants did not compete unfairly with Axelbank.

On the basis of the foregoing findings, the trial court rendered judgment for defendants.

With respect to Rony's counterclaim for libel, the trial court found that the Heintz letter constituted libel *per*

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He is a Russian refugee who received hospitality in this our fair land, on his pledge to earn his living honestly and to respect and obey our laws, though they may differ from his Russian Czarist or Stalinist laws.

"This is a very serious case of brazen piracy and copyright violation. This spurious show has been serialized on your station since last May, 1955. You are respectfully warned not to televise or in any other way shape or manner, exhibit any more of this 'hot' 16mm footage or any portion or portions thereof and to return to me promptly every foot of this stolen 16mm print, whether it be the positive 16mm print originally looted or any portion or portions thereof he has 'duped' and made dupe-prints of, whether in 16 or 35mm width.

"On the advice of my attorney I shall withhold any and all publicity on this to the major news services until you have contacted me within the time limit as hereinafter set forth.

"Unless I hear from you within 48 hours I shall instruct my attorneys to immediately file suit against all parties involved for damages and for an injunction restraining the further televising of this copyrighted film or any portion or portions thereof.

"Very truly yours,  
(Herman Axelbank)"

se and that it was maliciously motivated and hence unprivileged. [C. T. A. p. 226]. Accordingly, the Court awarded Rony judgment on his counterclaim in the sum of \$500.

### SUMMARY OF ARGUMENT.

The trial court's findings, amply supported by the evidence, establish that appellees did not copy any protectible portion of appellant's film. The subject matter of appellant's film, *i. e.*, historical events surrounding the Russian Revolution, is not subject to copyright protection. In fact, the only portions of appellant's film which could possibly have been entitled to copyright protection were its sequence of development and a commentary by Max Eastman, neither of which were copied by appellees.

Moreover, any rights which appellant may have had in his collection of newsreel films were abandoned by publication with an improper designation of appellant as copyright proprietor.

Finally, appellant failed to establish the requisite interest in the copyright upon which he purports to sue.

Accordingly, the trial court properly rendered judgment for appellees on appellant's claim of copyright infringement and unfair competition.

With respect to appellee Rony's counterclaim for libel, the trial court's findings, amply supported, by the evidence, establish the propriety of the trial court's judgment in favor of Rony. The Heintz letter, upon which the libel claim is based, clearly constituted libel *per se*. Moreover, that letter was maliciously motivated and hence unprivileged.

ARGUMENT.

I.

Appellant Has Failed to Establish a Claim for  
Copyright Infringement.

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- A. The Plaintiff in an Action for Copyright Infringement Has the Burden of Establishing That the Defendant Has Infringed Plaintiff's Work by Copying a Substantial Portion of the Protectible Material Contained Therein.

*Harold Lloyd Corporation v. Witwer*, 65 F. 2d 1  
(C. C. A. 9, 1933);

*Hirsch v. Paramount Pictures*, 17 Fed. Supp.  
816 (S. D. Cal. 1937) (Yankwich, J.).

1. *In Order to Prove a Claim of Copyright Infringement, Plaintiff Must Establish That Defendant Has Copied a Substantial Portion of Plaintiff's Work.*
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*Hirsch v. Paramount Pictures, supra*, 17 Fed.  
Supp. 816.

In order to establish that there has been copying, plaintiff must demonstrate that there are marked similarities between the two works. The determination whether such similarities exist is basically a question for the trier of facts.

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*Hirsch v. Paramount Pictures, supra*, 17 Fed. Supp.  
816.

See also:

*Funkhouser v. Loew's, Inc.*, 208 F. 2d 185 (C. A.  
8, 1953).



The applicable standard has been stated as follows in *Funkhouser v. Loew's, Inc.*, *supra* (208 F. 2d 188):

“ . . . the test used to determine infringement in cases of this kind is whether ordinary observation of the motion picture photoplay would cause it to be recognized as a picturization of the compositions alleged to have been copied, and not whether by some hypercritical dissection of sentences and incidents seeming similarities are shown to exist. . . .”

Moreover, while a claim of infringement will automatically fail where similarity is lacking, the mere presence of similarities does not necessarily suggest infringement where those similarities are explainable in terms of the treatment necessarily accorded the common subject matter.

See, *e.g.*:

*Dorsey v. Old Surety Life Ins. Co.*, 98 F. 2d 872 (C. C. A. 10, 1938);

*Oxford Book Co. v. College Entrance Book Co.*, 98 F. 2d 688 (C. C. A. 2, 1938);

*Harold Lloyd Corporation v. Witwer*, *supra*, 65 F. 2d 1 (C. C. A. 9, 1933).

Thus, where the materials involved are mere narratives of historical events, similarities between the two works may be attributed to the fact that both were obtained from a common source.

*Greenbie v. Noble*, 151 Fed. Supp. 45 (S. D. N. Y. 1957);

*Echevarria v. Warner Bros. Pictures*, 12 Fed. Supp. 632, 638 (S. D. Cal. 1935);

*Oxford Book Co. v. College Entrance Book Co.*, *supra*, 98 Fed. 2d 688.

As noted in *Echevarria v. Warner Bros. Pictures, supra* (12 Fed. Supp. 638):

“One cannot build a story around a historical incident and then claim exclusive right to the use of the incident.”

Again, in *Oxford Book Co. v. College Entrance Book Co., supra*, the court observes (98 F. 2d 691):

“. . . The true concept of what a copyright covers as well as what it does not was given by Judge Learned Hand in *Arnstein v. Edward B. Marks Music Corp., supra*, when he said, ‘The “sole liberty of printing, publishing and vending” the “work” means the liberty to make use of the corporeal object by means of which the author has expressed himself; it does not mean “the sole liberty” to create other “works,” even though they are identical.’ This applies with especial force to works on the same period in history. The subject matter is of necessity what events have made it and the order of treatment whether that be chronological or topical is fixed by the facts. . . .

For the foregoing reasons no need exists for analyzing in detail the fairly numerous places in the text in each book where substantially the same thing on the same subject has been said in different words. That was proper enough and, indeed, inevitable if both books were to serve their purpose. They had to contain the more important facts of history. This being so, no sound reason remains for saying that the accused book in its text is a copy of any substantial part of the copyrighted book. . . .”



2. *Where Only Portions of a Copyrighted Work Are Protectible, the Question of Infringement Must Be Determined Solely With Reference to Whether There Has Been Substantial Copying of the Protectible Portions of the Work.*

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*Chamberlin v. Uris Sales Corporation*, 150 F. 2d 512 (C. C. A. 2, 1945);

*Lake v. Columbia Broadcasting System*, 140 Fed. Supp. 707 (S. D. Cal. 1956).

Thus, where a copyright is obtained upon a collection of materials, some of which have been previously published, the copyright protects only that which is original in the new collection.

*Andrews v. Guenther Pub. Co.*, 60 F. 2d 555, 557 (S. D. N. Y. 1932).

**B. The Trial Court's Findings, Amply Supported by the Evidence, Establish That Appellees Did Not Copy Any Protectible Portion of Appellant's Film.**

1. *The Subject Matter of Appellant's Film, i.e., the Historical Events Surrounding the Russian Revolution, Is Not Subject to Copyright Protection.*

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(a) Historical Facts and Events in Themselves Are in the Public Domain and Are Therefore Not Entitled to Copyright Protection.<sup>14</sup>

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<sup>14</sup>The mere fact that a copyright is obtained for a given work does not establish that the material contained therein is in fact copyrightable.

See, e.g.:

*Eggers v. Sun Sales Corporation*, 263 Fed. 373 (C. C. A. 2, 1920).

*Lake v. Columbia Broadcasting System, supra*,  
140 Fed. Supp. 707;

*Greenbie v. Noble, supra*, 151 Fed. Supp. 45  
(S. D. N. Y. 1957);

*Curtis v. Time, Inc.*, 147 Fed. Supp. 505 (Dist.  
Col. 1957) (Aff'd 251 F. 2d 389);

*Caruthers v. R. K. O. Radio Pictures*, 20 Fed.  
Supp. 906 (S. D. N. Y. 1937).

As stated in *Curtis v. Time, Inc., supra* (147 Fed.  
Supp. 505-506):

"No one has a right of property in a historical or biographical event. Any one may publish biographies or photographs of winners of the Congressional Medal of Honor, of Presidents of the United States, of Senators, Congressmen, or other public officials, or other public figures. Any one may publish narratives of historical events. For instance, in the past two or three years we have had a number of histories of the Civil War. No one can have a monopoly on the idea of publishing a history of particular wars or of any other events. . . ."

Again, in *Lake v. Columbia Broadcasting System, supra*, the court states (140 Fed. Supp. 709):

". . . the only similarity between the radio program and the copyrighted book is in the sequence of the claimed historical events and in a few instances the content of the dialogue, although the wording of the conversations which purportedly took place among the characters included in the common incident depicted is not the same; . . .

“ . . . accordingly plaintiff does not assert a claim which is actionable under the copyright statute; . . . ”

The court, in holding that a historical novel did not infringe on a prior biography dealing with the same historical character, observed in *Greenbie v. Noble, supra* (151 Fed. Supp. 65, 66):

“It is well settled that the facts concerning the actual life of an historic character are in the public domain and are not entitled to copyright protection. . . .

. . .

“There is no copyright of facts news or history.

. . .

. . .

“The fact that plaintiff’s biography was published before the defendant’s novel does not give plaintiff a monopoly of the subject matter, since, unlike the law of patents, ‘mere priority in time does not confer a monopoly.’ . . .

“By drawing upon materials and information from sources available to all, an author does not thereby obtain the right to exclude others from using the same materials.”

“It is true that infringement may result from copying a work which is based upon material in the public domain. But this happens only when the material so taken has been transformed by the first taker or borrower as to entitle him to a claim of originality.”

*Hirsch v. Paramount Pictures, supra*, 17 Fed. Supp. 816, 818.

See also:

*Andrews v. Guenther Pub. Co.*, *supra*, 60 F. 2d 555, 557.<sup>15</sup>

(b) The Subject Matter of Appellant's Film Is Not Subject to Copyright Protection.

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The Court found that the motion picture films exhibited by the defendants and which were claimed by Axelbank to have infringed upon Axelbank's rights were drawn from the public domain [C. T. A. p. 226]. Similarly, the Court found that Axelbank's motion picture "Tsar to Lenin" was also compiled from the public domain. This finding was amply supported by the evidence, as both Axelbank's witness, Max Eastman, and defendant Rony testified that newsreel films of the happenings during the period surrounding the Russian Revolution were freely bought and sold throughout the markets of the world and that prints thereof were generally available.<sup>16</sup>

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<sup>15</sup>The cases cited by appellant do not suggest a contrary view.

Thus, in *Bobbs-Merrill Company v. Straus*, 28 S. Ct. 722 (1908), the Court merely held that a copyright does not entitle its holder to control resale price, a problem which is in no way involved in the instant case.

Again, in *Bleistein v. Donaldson Lithographing Co.*, 23 S. Ct. 298 (1903), the Court held that pictorial illustrations are subject to copyright—hardly the situation with which we are here concerned.

<sup>16</sup>It should be understood that defendants make and have made no claim of exclusive ownership. They freely assert that Axelbank has as much right to use the film materials contained in "Tsar to Lenin" as defendants have to use the same materials in their motion pictures and television broadcasts. Both were drawn from a common source, to-wit: the public domain.

*American Code Co. v. Bensinger*, 282 Fed. 829 (C. C. A. 2, 1922), which involved the copyright of a telegraph code, is actually authority for appellees rather than appellants, for in that case the court expressly recognized the propositions which respondents are urging here.

2. *The Only Portions of Appellant's Film Which Could Possibly Have Been Entitled to Copyright Protection Were Its Sequence of Development and the Commentary of Max Eastman, Neither of Which Were Copied by Appellees.*
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In the preceding section we have pointed out wherein the historical events which form the subject matter of appellant's film were not subject to copyright protection. Aside from the subject matter, the components of appellant's work may be classified as follows:

(a) A series of newsreel films depicting events surrounding the Russian Revolution.

(b) A few maps for which appellant claims credit.

(c) The way in which the individual scenes and sequences were put together, *i.e.*, the sequential development.

(d) The commentary of Max Eastman.

When the foregoing elements are analyzed in the light of the trial court's findings and the evidence in support thereof, it is clear that respondents have not copied any protectible portion of appellant's film.

(a) The Trial Court Properly Found That the Newsreel Films Collected by Appellant Were Not Copied by Respondents. Moreover, The Newsreel Films in Question Were in the Public Domain by Virtue of Prior Publication Without Copyright.

It is clear that appellant could not ground a claim of copyright infringement upon any alleged copying by respondents of the newsreel films collected by appellant.



*First of all, the trial court's findings, amply supported by the evidence, establish that respondents did not copy the films in question, but instead obtained the films through extensive independent efforts.*

Rony, both by testimony and through documentary evidence, demonstrated that the films used by the defendants were collected through independent efforts. Some Rony brought with him from Russia, some he bought in Germany, others in France, and some he photographed himself. The uncontroverted testimony is that Rony did not copy Axelbank's film and had never seen such film until after this action was filed [T. p. 799, line 18]. This, it appears that not only was Axelbank's film unprotectible but it was not in fact copied by defendants.

*Secondly, the newsreel films which appellant used in his film "Tsar to Lenin" were in the public domain by virtue of prior publication without copyright.*

Even had there been any protection for Axelbank's material, it was waived by prior and extensive publication by Axelbank without copyright. Axelbank admitted he had made prior motion pictures incorporating the same footage and sequences as are contained in the picture "Tsar to Lenin" and published these without notice of copyright [T. p. 411, line 13; p. 488, line 13; p. 521, line 20; p. 533, line 1; p. 558, line 14]. In addition, Axelbank licensed the use and reuse of the film for television [T. p. 469, line 3]. Finally, the first version of Axelbank's film was published without notice of copyright [T. p. 380, line 10, *et seq.*].<sup>17</sup>

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<sup>17</sup>It should be noted that Axelbank has never contended that there are any invented or directed scenes in his motion picture but acknowledges that it is (with the exception of a few maps and charts) essentially a newsreel [T. p. 528, line 16].

The evidence establishes that the individual scenes and sequences contained in the film "Tsar to Lenin" had been sold and resold throughout the world for a period of years prior to plaintiff's acquisition thereof. Thus, appellant himself testified that prior to the completion of the film, "Tsar to Lenin," he had sold most, if not all, of the sequences later included in the film. Among these sales were the following:

(1) Numerous outright sales to newsreel companies of footage later used in "Tsar to Lenin" [T. p. 380, line 21];

(2) Sale of at least 4,000 feet of film to the Soviet Government (all claimed to be original negatives) [T. p. 411, line 13];

(3) Over 1,000 feet of film of Russian historical events included in a motion picture entitled, "The Last of the Czars," admittedly distributed by Axelbank without notice of copyright [T. p. 411, line 13; p. 488, line 13; p. 530, line 1; p. 531, line 20; p. 558, line 14];

(4) Over 3,700 feet of film of Russian historical events included in a motion picture entitled "The Truth about Russia," admittedly distributed by Axelbank without notice of copyright [T. p. 488, line 13].

Appellant further testified that material from each of these sources was also included in "Tsar to Lenin." He was completely uncertain as to the amount of such footage used in "Tsar to Lenin" and the speculative nature of his testimony as to how much of the film later appeared in "Tsar to Lenin" almost requires the conclusion that all of what was to become "Tsar to Lenin" was included in appellant's prior sales of Russian footage.



Under such circumstances, it is clear that the materials included in "Tsar to Lenin," even if originally copy-rightable, had long since become a part of the public domain.

See, *e.g.*:

*Egner v. E. C. Schirmer Music Co.*, 139 F. 2d 398 (C. C. A. 1, 1943);

*Snow v. Laird*, 98 Fed. 813 (C. C. A. 7, 1900);

*Davis-Robertson Agency v. Duke*, 119 Fed. Supp. 931 (E. D. Va. 1953);

*Basevi v. Edward O'Toole Co.*, 26 Fed. Supp. 41 (S. D. N. Y. 1939).

Thus, in *Davis-Robertson Agency v. Duke*, *supra*, the court states (119 Fed. Supp. 934):

"The evidence discloses that many of the 'cuts' which the defendant contends were copied by the plaintiffs were published by the defendant prior to any attempt on the part of the defendant to copy-right them. This would vitiate a copyright subsequently obtained thereon. . . ." <sup>18</sup>

Appellant's only answer to this obvious defect in his claim is a statement that a copyright owner may sell a copy of his work without impairing his right to prevent others from reproducing it. But this general principle has no application to the present case, for it relates solely to *sales made after copyright protection has been obtained*, in which event prevention of reproduction is the very essence of copyright protection. It has no applica-

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<sup>18</sup>Appellant could not avoid the effect of the foregoing rule by mere minor alterations in the materials previously published.

See,

*Snow v. Laird*, *supra*, 98 Fed. 813.

tion whatever to a situation in which *copies are sold prior to copyright*. In the latter case the work is thereby dedicated to the public so that it may not thereafter become a proper subject of copyright protection. That is precisely what happened in the instant case.

(b) Appellant's Maps and "Blow-ups" Were Not Subject to Copyright Protection. Moreover, the Trial Court Properly Found That There Was No Copying of Such Maps and Blow-ups by Respondents.

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It is well established that there can be no copyright protection for a map unless its creation involves sufficient original work to warrant protection.

*Amsterdam v. Triangle Publications*, 189 F. 2d 104 (C. A. 3, 1951);

*Andrews v. Guenther Pub. Co.*, *supra*, 60 F. 2d 555;

*Marken and Bielfeld, Incorp. v. Baughman Co.*, 162 Fed. Supp. 561 (E. D. Va. 1957).

Thus, in *Amsterdam v. Triangle Publications*, *supra*, the court, after noting that a plaintiff cannot copyright "the arbitrary color schemes, symbols or numbers that he uses on his map" (189 F. 2d 106), explains the necessity for original effort as follows (189 F. 2d 106):

" . . . The presentation of ideas in the form of books, movies, music and other similar creative work is protected by the Copyright Act. However, the presentation of information available to everybody, such as is found on maps, is protected only when the publisher of the map in question obtains originally some of that information by the sweat of his own brow. . . ."

Again, in *Marken and Bielfeld, Incorp. v. Baughman Co.*, *supra*, the court observes (162 Fed. Supp. 562-563):

“ . . . While it is not required that the compilation be the sole product of the maker, it is clear that something more than the compilation of information procured by others is required to make a map copyrightable. There must be originality resulting from the independent effort of the maker in acquiring a reasonably substantial portion of the information. . . . ”

In the instant case the trial court was certainly entitled to conclude that the map in question did not contain sufficient original work to warrant protection. In fact, it is difficult to see how any other conclusion could have been reached. Moreover, the maps in question were not subject to copyright protection because they had been sold and published by appellant prior to copyright. (See point a, *supra*) [T. p. 201, line 8; p. 203, line 9].

*Even assuming, arguendo, that appellant's maps were protectible, the trial court properly found that there was no copying of them by respondents.*

There is no evidence whatever that the maps which Axelbank claims were original were copied by any of the defendants. Further, the evidence clearly demonstrates and the court found that, as a matter of fact, no copying was done by defendants. The mere fact that similar maps may have appeared in Axelbank's and defendants' films did not require the trial court to find that there had been copying. On the contrary, it was freely admitted by defendants that much of their material was similar, if not identical, to Axelbank's. However, it is equally clear that Axelbank's entire motion picture was available

piecemeal and otherwise in the film markets of the world.

(c) Defendants Did Not Copy Axelbank's Sequential Development.

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In any historical treatment of the events surrounding the Russian Revolution, one would necessarily expect to find certain similarities in sequence arising from the very nature of the subject matter. Accordingly, even if there had been similarities of a pronounced nature in the respective sequential treatment of this historical material by Axelbank and Rony, that would hardly afford convincing evidence that Rony had copied Axelbank's work.

In the instant case, however, it is not even necessary to resort to such a principle, for the findings, amply supported by the evidence, establish that there was no marked similarity in the sequential development of the two works.

Axelbank, by his own testimony and his letter to Heintz, has demonstrated that defendants' pictures were not similar to Axelbank's, particularly in the matter of sequential treatment. Thus Axelbank, in his letter to Heintz [C. T. A. p. 4], states of Rony:

"He shrewdly cut this 'hot' print up into an unrecognizable jumble of unrelated shots in a hodge-podge of picture-puzzle clap-trap to evade comparison . . . ."

and further states of Rony's film ". . . it scarcely resembles my original print from my original negative." Thus, Axelbank himself has acknowledged the obvious lack of merit in his claim of similarity.

(d) Max Eastman's Commentary.

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The remaining element of appellant's film is the commentary of Max Eastman. The evidence establishes beyond question that respondents did not copy any portion of this commentary, and therefore no claim of infringement will lie on that ground.<sup>19</sup>

**C. Any Rights Which Appellant May Have Had in His Collection of Newsreel Films Were Abandoned by Publication With an Improper Designation of Appellant as Copyright Proprietor.**

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The evidence established that appellant published "Tsar to Lenin" with the following copyright designation: "Herman Axelbank 1937." In fact, Axelbank was not the copyright proprietor either in 1937 or at the date of such publication (See Point ID, *infra*). By virtue of such publication, appellant lost any copyright protection which may have existed in the film.

*Group Publishers v. Winchell*, 86 Fed. Supp. 573 (S. D. N. Y. 1949).

In *Group Publishers v. Winchell*, *supra*, the court held that substitution of the name of an assignee in a notice of copyright, prior to the recordation of the assignment, results in an abandonment of the copyright and a dedication of the work to the public. In so holding, the court declared (86 Fed. Supp. 577):

"The Congressional policy reflected in the statute is that the notice of copyright shall contain, as proprietor, the name of the holder of record; for indis-

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<sup>19</sup>In *RCA Mfg. Co. v. Whiteman*, 114 F. 2d 86 (C. C. A. 2, 1940), cited by appellant, the court was merely concerned with whether a purchaser of records could be enjoined from making radio broadcasts of them. It is difficult to see how appellant can purport to derive support from such a case.



criminate substitution could result in considerable confusion and would not 'sufficiently aid in tracing \* \* \* title if need be.' *Fleisher Studios v. Ralph A. Freundlich, Inc.*, *supra*, 73 F. 2d at page 277.

"Plaintiff claims that the words of Section 32 are merely permissive or hortatory and do not prohibit an assignee, absent recordation, from freely substituting his name in the notice of copyright for that of the assignor. But to put this interpretation on the language of that section completely emasculates the provision and renders its inclusion within the act meaningless; for the section would serve no purpose if the assignee could, with equal force, substitute his name for that of the assignor prior to recordation.

"The interpretation just given has been the considered construction of Section 32 given by authorities in the field of copyright law and seems the only consistent interpretation which will give meaning to the language of the provision. Having substituted the name 'Group Publishers, Inc.' in the copyright notice before recordation of the assignment of the copyright to it, plaintiff may no longer assert rights under the copyright and defendant's motion for summary judgment must be granted. . . ."

Likewise, in the present case Axelbank himself testified that he placed upon his film a purported copyright notice "Copyright Herman Axelbank 1937" [T. p. 434, line 6], and admits that he has exhibited the film with said designation since 1953 [T. p. 434, line 10]. There is no evidence whatever that Axelbank had any copyright in 1937 and certainly none that the motion picture was ever exhibited prior to 1952 with an appropriate

notice of copyright. The record is totally devoid of any evidence that Axelbank had any copyright in 1937. His designation "Copyright Herman Axelbank 1937" was wholly fictitious and the trial court properly so found [C. T. A. p. 226]. Axelbank's own testimony and evidence demonstrate that the copyright was not even purportedly assigned to Axelbank until 1956 through the device of a *nunc pro tunc* order made by a New York court *after this action was filed* (See Point ID, *infra*).

**D. Appellant Is Not the Real Party in Interest and Therefore May Not Recover in Any Event.**

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1. *A Claim for Copyright Infringement Must Ordinarily Be Brought by the Copyright Proprietor. At the Very Least, the Copyright Proprietor Is Normally an Indispensable Party to Such an Action.*
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*Alexander v. Irving Trust Company*, 132 Fed. Supp. 364 (S. D. N. Y. 1955) (Aff'd 228 F. 2d 221).

Cf.

*Goldwyn Pictures Corporation v. Howells Sales Co.*, 282 Fed. 9 (C. C. A. 2, 1922);

*Eliot v. Geare-Marston, Inc.*, 30 Fed. Supp. 301 (E. D. Pa. 1939).

Thus, in *Alexander v. Irving Trust Company*, *supra*, the court states (132 Fed. Supp. 369):

"It is well settled that in an action for infringement of copyright, the copyright owner is an indispensable party. . . ."



The foregoing rule is well supported in logic and in justice. If the law were otherwise, an alleged infringer would be put to the risk of defending suits for the same wrong by both the legal proprietor and the equitable proprietor. The requirement that all parties be present before the court avoids a multiplicity of suits.

In addition, in the absence of the legal proprietor of the copyright there is no way to contravene or disprove the alleged equitable owner's allegations with respect to how he came by his equitable title. Such findings of fact as may be made are manifestly not binding upon the legal proprietor unless he is a party to the suit. The result for which appellant argues would achieve not only a multiplicity of suits, but conceivably a multiplicity of liabilities.

The cases cited by appellant do not suggest a contrary view.

In *New Fiction Publication Co. v. Star Co.*, 220 Fed. 994 (S. D. N. Y. 1915), the sole question involved was whether the plaintiff was an assignee or licensee. The court held that since there was not a full assignment, the plaintiff did not have sufficient interest to be the copyright proprietor. Hence, the case is authority for appellees rather than appellant.

*Sunset Securities Co. v. Coward McCann, Inc.*, 47 Cal. 2d 907, 306 P. 2d 777 (1957), cited by appellant, is completely out of point here, for that case was concerned solely with the construction of the language of a licensing agreement and has no bearing on the instant case.

2. *Appellant Failed to Establish the Requisite Interest in the Copyright Upon Which He Purports to Sue.*

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Axelbank's claim of copyright proprietorship is based upon an alleged assignment made by Axelbank as receiver to himself in his individual capacity in 1952. In point of fact, however, the evidence adduced at the trial establishes, as the trial court properly found, that no effective assignment was made in 1952, or indeed, at any time prior to the filing of the present action.

First of all, under the order of the New York Court of March 6, 1941 appointing Axelbank as successor-receiver (without bond) in a proceeding relating to the film "Tsar to Lenin," Axelbank was empowered:

" . . . to receive, preserve, and administer the subject matter of this action . . . with power to do each and every act necessary and proper for the public presentation of said film, and to negotiate and make contracts with respect to said film and the public exhibition thereof, provided, however, *that the said receiver shall incur no obligations, contractual or otherwise, with respect to the sale or lease of said film, other than upon contracts directly with theater exhibitors made in the ordinary course of business, except upon the order of this Court* after at least five (5) days notice of motion served personally upon Max Eastman and Samuel Malitz . . . ." (Emphasis added).

Thus, by the very terms of the order under which plaintiff was appointed receiver, it is perfectly evident that he had no authority to make an assignment of the copyright to himself *except upon court order*.

Under New York law, action taken by a receiver in the absence of a court order, where such order is required, is void.

See, *e.g.*:

*Alexander v. Valumet Chocolate Co.*, 266 N. Y. Supp. 15, 240 App. Div. 769 (1933);

*Simmons v. Woods*, 45 How. Prac. 262 (N. Y. Sup. Ct. 1873).

Thus, in *Simmons v. Wood*, *supra*, the court observes (45 How. Prac. 268):

“The *ex parte* order of December 16, 1869, appointing the receiver, contained an authority to him to sell at public or private sale, in his discretion, the grants, franchises and property in question, with this express reservation, ‘*subject to the orders of this court.*’ No transfer of the interests sold could, therefore, properly be made by the receiver until his report of sale was made and an order of confirmation granted on notice to the parties who had appeared in the action. Any transfer before such confirmation would be unauthorized; . . . .”

Thus, it is clear that the purported assignment of the copyright to appellant was a nullity as of the time it was made, in the absence of a court order authorizing it.

*It is equally clear that the order of the New York Court of February 1956 cannot serve to validate that assignment nunc pro tunc so as to vest a proprietary interest in the copyright in appellant as of an earlier date, for the New York courts have repeatedly held that a nunc pro tunc order may not be used to record a fact as of a prior date, when it did not then exist.*

See, *e.g.*:

*In the Matter of Inez Yancey*, 307 N. Y. 858,  
122 N. E. 2d 746 (1954);

*Merrick v. Merrick*, 266 N. Y. 120, 194 N. E.  
55 (1934);

*Stock v. Mann*, 255 N. Y. 100, 174 N. E. 76  
(1930);

*Guarantee Trust and Safe Deposit Co. v. Phila-  
delphia, Reading and New England Railroad  
Company*, 160 N. Y. 1, 54 N. E. 575 (1899);

*Smith v. New York Cent. R. Co.*, 183 App. Div.  
478, 171 N. Y. Supp. 64 (1918).<sup>20</sup>

Thus, in *Guarantee Trust and Safe Deposit Co. v. Philadelphia, Reading and New England Railroad Company*, *supra*, the court states the controlling rule as follows (160 N. Y. 7):

“ . . . The theory upon which an order may be granted to take effect as of a previous date, is that some ruling has been made which was not properly, or was improperly, entered. A court has no power to have a new order or ruling so entered, thus bringing into the record an element which did not previously exist. The facts must exist, and then if the record of them is imperfect or incomplete, it may be amended, but if the record shows the actual facts then no order can be properly made changing them so as to take the place of an act that was required to be previously performed. *While a court may record existing fact nunc pro tunc, it can-*

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<sup>20</sup>See also, *Mohrmann v. Kob*, 291 N. Y. 181, 51 N. E. 2d 921 (1943), *Gravino v. Gravino*, 3 A. D. 2d 641, 158 N. Y. S. 2d 130 (1956), *In re MacEwan's Estate*, 280 App. Div. 193, 112 N. Y. S. 2d 644 (1952), *Dusch v. Dusch*, 167 Misc. 449, 4 N. Y. S. 2d 49 (1938) (aff'd 257 App. Div. 909, 12 N. Y. S. 2d 252).



not record a fact as of a prior date when it did not then exist . . .” (Emphasis added).

Again, in *Stock v. Mann*, *supra*, the court held that a foreign conservator of the estate of a non-resident incompetent could not be appointed *nunc pro tunc* as committee of her property in the State of New York so as to validate the conservator’s prior authorization of an appearance for the incompetent in a New York action.

Similarly, in *Smith v. New York Cent. R. Co.*, *supra*, the court, in holding that the court below could not appoint an administratrix *nunc pro tunc* so as to validate the bringing of an action by her prior to her appointment, explained (171 N. Y. Supp. 66):

“The plaintiff was not the administratrix when the action was commenced, and no subsequent order can change that fact. As was said in *Guarantee Trust Co. v. P., R. & N. E. R. R. Co.*, 160 N. Y. 1, 54 N. E. 575:

“While a court may record an existing fact *nunc pro tunc*, it cannot record a fact as of a prior date when it did not then exist.’”<sup>21</sup>

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<sup>21</sup>The federal courts have recognized that the foregoing rule represents the established law of the State of New York.

See,

*Daine v. Commissioner of Internal Revenue*, 168 F. 2d 449 (C. C. A. 2, 1948);

*Kliger v. Rosenfeld*, 130 App. Div. 421, 114 N. Y. Supp. 1006 (1909), cited by appellant, does not suggest a contrary view. The *Kliger* case merely involved a *nunc pro tunc* order authorizing a receiver to pay certain debts which had already been paid, on the ground that “he should not now be compelled to be at a loss, merely because his counsel advised him erroneously and failed to protect him by applying for an order permitting the payment.” (114 N. Y. Supp. 1008.) The court observed that it was “unwilling to absolutely cut the receiver off from any opportunity to protect himself and defend the payments made by him.” (114 N. Y. Supp. at 1008.) That is hardly the case with which we are confronted here.

The application of these rules to the case at bar is obvious. In the instant case, *no order or judicial determination had been made* in 1952 vesting copyright proprietorship in Axelbank. *No order of jucicial determination had been made* in 1952 approving an assignment from Axelbank as receiver to Axelbank as an individual. *No order or judicial determination had been made* in 1952 so far as appears determining these vital issues in any manner whatsoever, either favorably to Axelbank or unfavorably to him. Axelbank had not even in fact executed the proposed assignment. What is contended for now by plaintiff is that a New York Court in 1956 can sanctify plaintiff's efficient hindsight by validating for plaintiff *acts performed in* 1956. It is not even contended by plaintiff that these acts were done (as required by the rule set forth) at an earlier date and simply not made of record. Plaintiff admits that these acts were not done until 1956. Plaintiff in short has asked the New York court to create a new fact (copyright proprietorship in Axelbank) which did not exist in 1952.

In short, to paraphrase the language of the *Smith* case, *supra*, "the plaintiff was not the [copyright proprietor in 1952], and no subsequent order can change that fact.



II.

Appellant Has Failed to Establish His Claim of  
Unfair Competition.

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It is rather surprising to find appellant urging at this late stage of the proceedings that respondents were guilty of unfair competition, in light of the fact that appellant clearly failed to prove this claim at the trial. In any event, it is clear that no claim of unfair competition was established.

The essence of an unfair competition claim consists of the passing off of one's products as those of another.

*American Philatelic Society v. Claibourne*, 3 Cal. 2d 689, 46 P. 2d 135 (1935).<sup>22</sup>

Thus, in *American Philatelic Society v. Claibourne*, *supra*, the court states (3 Cal. 2d 697):

“ . . . The case books are replete with cases which hold that the essence of unfair competition lies in the simulation and imitation of the goods of a rival or competitor with the purpose of deceiving the unwary public into buying the imitation under the impression that it is purchasing the goods of such competitor. . . . ”

In the present case this essential element of unfair competition is obviously lacking. Thus, there is no allegation of any attempt on the part of the respondents to pass off their goods as those of the appellant. On the contrary, as heretofore noted (Point IB2(c), *supra*), appel-

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<sup>22</sup>*Cf. Heckenkamp v. Ziv Television Programs*, 157 Cal. App. 2d 293, 321 P. 2d 137 (1958).

lant has asserted that Rony's work is so dissimilar from his own as to be almost unrecognizable; and if appellant has difficulty in perceiving any similarity between the two works, certainly it is not likely that the public would be deceived.<sup>23</sup>

*International News Service v. Associated Press*, 248 U. S. 215 (1918), cited by appellant, does not suggest a contrary view, for as Judge Learned Hand observes in *RCA Mfg. Co. v. Whiteman*, 114 F. 2d 86 (C. C. A. 2, 1940) (referring to the *Associated Press* case), "That much discussed decision really held no more than that a western newspaper might not take advantage of the fact that it was published some hours later than papers in the east, to copy the news which the plaintiff had collected at its own expense. In spite of some general language it must be confined to that situation . . ." (114 F. 2d 90).<sup>24</sup>

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<sup>23</sup>Moreover, since appellant's claim of unfair competition is based essentially on the same facts as appellant's claim of copyright infringement, the trial court's adverse findings on those facts, which are amply supported by the evidence, are fatal to both claims. See, e.g., *Alexander v. Irving Trust Company*, *supra*, 132 Fed. Supp. 364, 368. Cf., *Lake v. Columbia Broadcasting System*, *supra*, 140 Fed. Supp. 707, 709.

<sup>24</sup>Again, in *Alexander v. Irving Trust Company*, *supra*, the court notes (132 Fed. Supp. 368):

"Plaintiff asserts that she has a right to the protection of her material independently of copyright on the theory of *International News Service v. Associated Press*, 1918, 248 U. S. 215, 39 S. Ct. 68, 63 L. Ed. 211,—a decision involving a news gathering service where protection was given against the raiding of news services supplied by the plaintiff. This so-called 'free ride' doctrine has been limited to cases where an attempt is made to secure an unfair advantage of the character proscribed in the *Associated Press* case. . . ."

III.

The Trial Court's Findings, Amply Supported by the Evidence, Establish That Appellee Rony Was Properly Awarded Judgment on His Counterclaim for Libel.

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*Preliminary statement.*

Axelbank, on September 5, 1955, wrote a letter to Mr. Jack Heintz of Television Station KCOP, in which he accused Rony of pirating the film "Tsar to Lenin" and made accusations of the vilest kind against Rony.<sup>25</sup> There was uncontroverted testimony that as a direct result of the receipt of such letter by KCOP, Rony's television program was cancelled [T. p. 738, line 8; p. 739, line 12]. On the basis of this letter, Rony filed a counterclaim for libel against Axelbank [C. T. A. p. 41]. The trial court found the letter to be libelous *per se* and to have been maliciously motivated, and accordingly, rendered judgment in favor of Rony on his counterclaim.

A. Appellant's Letter to Heintz Constituted Libel Per Se.

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Civil Code, Sections 45, 45a;

*Bates v. Campbell*, 213 Cal. 438, 2 P. 2d 838 (1931);

*Jimeno v. Home Builders*, 47 Cal. App. 660, 191 Pac. 64 (1920).<sup>26</sup>

"Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed rep-

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<sup>25</sup>The letter in question is set out *in haec verba* in our Statement of the Case, *supra*.

<sup>26</sup>See also *Draper v. Hellman Commercial Trust and Savings Bank*, 203 Cal. 26, 263 Pac. 240 (1928); *Williams v. Seiglitz*, 186 Cal. 767, 200 Pac. 635 (1921), *Corrigan v. Macloon*, 22 F. 2d 520 (C. C. A. 9, 1927).

resentation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.”

Civil Code, Sec. 45.

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“ . . . The code definition of libel is very broad and has been held to include almost any language which, upon its face, has a natural tendency to injure a person’s reputation, either generally, or with respect to his occupation. . . .”

*Bates v. Campbell, supra*, 213 Cal. 438, 441.

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Publications falling within the above statutory definition are libelous *per se*, thus obviating the necessity for an averment of special damage.

*Bates v. Campbell, supra*, 213 Cal. 438, 442.

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In *Jimeno v. Home Builders, supra*, the court explains the applicable rule as follows (47 Cal. App. 663-664):<sup>27</sup>

“ . . . If, on its face, the publication is of a character that usually, ordinarily, and naturally detracts from the reputation and standing of the plaintiff, and tends proximately and naturally to deprive him of the confidence and esteem of others, thus causing him to be shunned or avoided, it is libelous *per se*, and special damages need not be alleged or proved. From such a publication the law presumes

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<sup>27</sup>“To be libelous *per se* the writing need not charge or impute a crime. . . .”

*Dethlefsen v. Stull*, 86 Cal. App. 2d 499, 502, 195 P. 2d 56 (1948).

See also:

*Stevens v. Snow*, 191 Cal. 58, 214 Pac. 968 (1923).

general damages as a natural and probably consequence.”<sup>28</sup>

It is clear that appellant’s letter to Heintz constitutes libel *per se*.

Thus, on its face the letter necessarily suggests that Rony was untruthful, that he received stolen property, that Rony intentionally misappropriated literary property, that Rony disobeyed the laws of the United States and that Rony is sympathetic to Czarist and Stalinist laws. No innocent or harmless interpretation could possibly be given to such a letter. The letter is a direct attack upon Rony’s good name and character and could have no other effect *but* to injure him in his occupation and expose him to hatred, contempt, ridicule and obloquy. The evidence demonstrates this was exactly what happened.

Moreover, considering Axelbank’s letter as a whole, the tone of the entire letter, apart from any individual words or sentences, is defamatory. This is not a letter written to assert a right or a claim. It is a false diatribe and no other meaning can be drawn from it except that intended by the author—that Rony is an evil person and a criminal.

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<sup>28</sup>*Babcock v. McClatchy Newspapers*, 82 Cal. App. 2d 528, 186 P. 2d 737 (1947), cited by appellant, does not suggest a contrary rule. The *Babcock* case involved the publication of a statement by a citizen regarding the qualifications of certain political candidates, in which he raised a question as to the source of certain funds obtained by one of the candidates. The facts upon which the question was premised were not denied and there was no clear-cut charge of dishonesty or corruption. The same can hardly be said for appellant’s letter with respect to respondent Rony in the instant case.



## B. The Heintz Letter Was Not Privileged.

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### *Preliminary Statement.*

The only possible basis for any privilege which might be asserted in the instant case is found in *Civil Code*, Section 47(3).<sup>29</sup>

Even assuming, *arguendo*, that that provision might have justified a proper letter by appellant, it is clear that

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<sup>29</sup>*Civil Code*, Section 47 provides:

"A privileged publication or broadcast is one made—

"1. In the proper discharge of an official duty.

"2. In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law; provided, that an allegation or averment contained in any pleading or affidavit filed in an action for divorce or an action prosecuted under Section 137 of this code made of or concerning a person by or against whom no affirmative relief is prayed in such action shall not be a privileged publication or broadcast as to the person making said allegation or averment within the meaning of this section unless such pleading be verified or affidavit sworn to, and be made without malice, by one having reasonable and probable cause for believing the truth of such allegation or averment and unless such allegation or averment be material and relevant to the issues in such action.

"3. In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information.

"4. By a fair and true report in a public journal, of (1) a judicial, (2) legislative, or (3) other public official proceeding, or (4) of anything said in the course thereof, or (5) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant shall have been issued.

"5. By a fair and true report of (1) the proceedings of a public meeting, if such meeting was lawfully convened for a lawful purpose and open to the public, or (2) the publication of the matter complained of was for the public benefit."

It is clear that none of the foregoing provisions, aside from Section 3, could have any possible application to the instant case.



the letter as written exceeds the bounds of any possible privilege:

*First, because it contains irrelevant matters which are not within the scope of the privilege.*

*Secondly, because it was actuated by malice which destroys the qualified privilege set forth in Section 47(3).*

1. *The Letter Contains Irrelevant Matter Which Is Not Within the Scope of the Privilege Accorded by Section 47(3).*
- 

Appellant's letter certainly exceeds any privilege which might have attached to it. Had he simply asserted his claim that he, Axelbank, was the proprietor of the property exhibited by KCOP and Rony, and had he then simply demanded withdrawal of the program or damages, concededly there might have been a privileged communication. But he went far beyond the necessary language to communicate such a claim.

It is therefore clear that appellant has exceeded any possible privilege he may have had under the circumstances.

See:

*Corrigan v. Macloon, supra*, 22 F. 2d 520 (C. C. A. 9, 1927).

2. *The Qualified Privilege Set Forth in Section 47(3) Is Not Available to Appellant in Light of the Fact That His Letter Was Actuated by Malice Toward Respondent Rony.*
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In order that the privilege accorded by *Civil Code*, Section 47(3) be available, it must appear that the publication was made without malice.

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*Morcom v. San Francisco Shopping News*, 4 Cal. App. 2d 284, 40 P. 2d 940 (1935);  
Civil Code, Section 47(3).

See also:

*Farr v. Bramblett*, 132 Cal. App. 2d 36, 281 P. 2d 372 (1955).

Thus, in *Morcom v. San Francisco Shopping News*, *supra*, the court states the rule as follows (4 Cal. App. 2d 288, 289):

“ . . . in order that the privilege accorded by subdivision 3 of section 47 of the Civil Code, be available, it must appear that the publication was made without malice. If it be made to appear that the defendant acted with malicious intent, in uttering the libel, it cannot successfully invoke the protection of this privilege.

“The absence of malice is an essential element of the privilege; and in the presence of malice, the privilege does not exist. The law does not accord to anyone the privilege of publishing maliciously a false and defamatory statement concerning another.”

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The tenor of the defamatory statement itself may be sufficient to establish the existence of malice.

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*Brewer v. Second Baptist Church*, 32 Cal. 2d 791, 197 P. 2d 713 (1948);

*Siemon v. Finkle*, 190 Cal. 611, 213 Pac. 954 (1923);

*Snively v. Record Publishing Co.*, 185 Cal. 565, 198 Pac. 1 (1921).

See, also:

*Preston v. Frey*, 91 Cal. 107, 27 Pac. 533 (1891).

Thus, in the leading case of *Snively v. Record Publishing Co.*, *supra*, the court states (185 Cal. 578):

“On the subject of actual malice it is important to note further that while one may, on a privileged occasion and without malice, publish to the interested persons what may be false, if he honestly believes it to be true, he is not by this rule given a license to overdraw, exaggerate, or to color the facts in his communication. The manner of statement is material upon the question of malice, and if the facts believed to be true are exaggerated, overdrawn, or colored to the detriment of plaintiff, or are not stated fully and fairly with respect to the plaintiff, the court or jury may properly consider these circumstances as evidence tending to prove actual malice, and they may be sufficient for that purpose without other evidence on the subject.”

Again, in *Siemon v. Finkle*, *supra*, the court declares (190 Cal. 618):

“ . . . Malice in fact may be proved either directly or indirectly—either by direct evidence of the evil motive or by legitimate inferences to be drawn from other facts and surrounding circumstances. And for the purpose of ascertaining the existence or nonexistence of actual malice there may be taken into consideration not only the general course of defendant’s conduct toward plaintiff and any specific act or acts tending to prove or disprove the existence of an evil motive, but also the internal



evidence furnished by the nature of the libel itself. (Davis v. Hearst, *supra*.)

“The general tone of the letter, the language employed therein to characterize plaintiff and plaintiff’s conduct, considered in the light of defendant’s motive for resentment therein disclosed, together with the fact that defendant Finkle unsolicited volunteered the first offer to furnish information about the plaintiff, warrant and support the inference that defendant Finkle was actuated in the publication of the false and defamatory statements by enmity and ill will.”<sup>30</sup>

Measured by the foregoing rules, it is clear that malice was amply established in the instant case.

First of all, the nature of the publication itself is clear evidence that appellant was maliciously motivated.

Moreover, malice is evidenced by Axelbank’s conduct in his interview with respondent Rony, in which Axelbank not only reiterated the defamatory matter but went so far as to threaten harm to Rony’s children [T. p. 807, line 8, to p. 809, line 22].

Finally, malice can be inferred from the fact that Axelbank harbored a grudge against Rony since the time when Rony was called as an expert witness by a defendant who was being sued by Axelbank [T. p. 798, line 10].

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<sup>30</sup>*Freeman v. Mills*, 97 Cal. App. 2d 161, 217 P. 2d 687 (1950), cited by appellant, is completely beside the point, as that case merely involves an agency report on its investigation of an employee under circumstances in which the communication was obviously privileged. In the *Freeman* case, *supra*, unlike the instant case, the report did not exceed the scope of the privilege and there was no evidence that it was maliciously motivated. That is hardly the situation with which we are confronted here.



CONCLUSION.

The trial court's findings, amply supported by the evidence, establish beyond question that appellant's claims of copyright infringement (and unfair competition) are utterly lacking in merit, and that appellee Rony is entitled to judgment on his counterclaim for libel. Accordingly, we respectfully submit that the judgment of the trial court should be affirmed in all respects.

Respectfully submitted,

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